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APPENDIX A

Docket Entries

May 13, 1968 —Motion to vacate sentence pursuant to Title 18 U.S.C. § 2255

May 13, 1968 —Affidavit of Harold Konigsberg

May 13, 1968 —Notice of Allocation and Assignment

May 20, 1968 —Motion for disqualification of Judge Shaw

August 22, 1968 —Order of Re-Assignment of Judge Whipple

February 13, 1969—Opinion and Order denying motion to vacate sentence—Filed

March 13, 1969 —Notice of Appeal

November 28, 1969—Opinion and Judgment of the United States Court of Appeals for the Third Circuit.

February 10, 1970—Order of the United States Supreme Court extending petitioner's time to file petition to March 28, 1970.

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APPENDIX B

Opinion and Order

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 465—68

HAROLD KONIGSBERG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

WHIPPLE, *District Judge*:

This is a motion brought by the petitioner, Harold Konigsberg, appearing pro se, pursuant to 28 U.S.C. § 2255 for an order vacating the sentence imposed in Criminal No. 31-62 (D.C.N.J. 1963), for the fixing of a date for a hearing and for the taking of testimony on the within motion. The petitioner was one of the defendants in the above indictment, and was subsequently tried by a jury, convicted and sentenced on July 16, 1963 to a term of ten years imprisonment. He thereupon appealed to the Court of Appeals for the Third Circuit from the judgment of conviction and sentence and that court affirmed and denied a petition for rehearing. *United States* v. *Konigsberg,* 336 F.2d 844 (3d Cir. 1964). His petition for a writ of certiorari was denied by the United States Supreme Court. *Konigsberg* v. *United States,* 379 U.S. 933 (1964). This is the first application before this court pursuant to § 2225.

As the basis of his motion, petitioner alleges that during the trial of the criminal action in 1963, there was a

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denial of his constitutional rights as to render the judgment vulnerable to collateral attack. Specifically, petitioner contends that the sentence imposed violated his *Fourth, Fifth* and *Sixth Amendment* rights in that (1) the petitioner's statements to the Federal Bureau of Investigation (FBI) were inadmissible as having been obtained in violation of his Sixth Amendment right to counsel; (2) the government suppressed favorable evidence hearing on petitioner's Fifth Amendment claim constituting a denial of due process of law; and (3) the petitioner had standing to attack the search and seizure as being violative of the Fourth Amendment.

It is not disputed that a § 2255 proceeding cannot be used to act as a substitute for a direct appeal of a conviction but rather is a collateral remedy which is available to the petitioner only if a basic fundamental right has been denied, and not merely as a routine review if the petitioner is dissatisfied with his sentence. See *Dirring* v. *United States*, 370 F.2d 862 (1st Cir. 1967); *Williams* v. *United States*, 365 F.2d 21 (7th Cir.), *cert. denied*, 385 U.S. 981 (1966). As a general rule, the doctrine of res judicata does not apply to a § 2255 motion. *Sanders* v. *United States*, 373 U.S. 1 (1963). However, there appears to be little doubt or disagreement that issues disposed of on appeal from the original judgment of conviction will not be reviewed again under § 2255 *if the precise issues were raised on direct appeal.* See *Baca* v. *United States*, 383 F.2d 154, 156 (10th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968); *Sykes* v. *United States*, 341 F.2d 104 (8th Cir. 1965); *Frye* v. *United States*, 337 F.2d 385, 386 (7th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965); *Lampe* v. *United States*, 288 F.2d 881 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 958 (1962).

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The petitioner urges that only through a hearing as provided for in § 2255 can he establish the allegations which have been enumerated above. This court is fully aware that § 2255 imposes an affirmative duty to look into the files and records of the case and only if they *conclusively show* that the petitioner is entitled to no relief, can this motion be dismissed without an evidentiary hearing (Emphasis added). *Brisco* v. *United States*, 368 F.2d 214 (3d Cir. 1966). Naturally, the production of the petitioner will be contingent upon the issues raised in a particular case. *United States* v. *Hayman*, 342 U.S. 205, 223 (1952). Therefore, the question arises whether petitioner is entitled to a hearing on his motion.

In *Sanders, supra*, at pp. 15-16 the Court discusses what standards should guide a federal court in granting a hearing pursuant to § 2255:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
>
> (1) By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations.

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> So also, identical grounds may often be supported by different legal arguments, * * *, or be couched in different language, * * *.
>
> (2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application * * *.
>
> (3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground * * *."

This court is of the opinion that the rules enunciated in *Sanders, supra,* regarding the availability of successive § 2255 motions should also apply to a federal prisoner's first § 2255 application. Therefore, in applying the test in *Sanders, supra,* the federal trial court must consider whether there is a need for collateral relitigation or whether the petitioner is seeking another hearing with a different legal emphasis. See Judge Wright's dissenting opinion in *Thornton* v. *United States,* 368 F.2d 822, 831 (D.C. Cir. 1966). The relitigation of trial issues under different labels or on expanded allegations that could have been made in the first instance is not contemplated by § 2255. *DeWelles* v. *United States,* 372 F.2d 67 (7th Cir.), *cert. denied,* 388 U.S. 919 (1967). If, however, purely legal questions are involved, the applicant may be entitled to a hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *Sanders, supra,* at 17.

Consequently, this court having reviewed the files and records of the proceedings of the petitioner, and in the exercise of its discretion will determine the motion from these sources without granting an oral hearing and without requiring the presence of the petitioner in this court.

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Before discussing the grounds urged by the petitioner, a review of the facts as disclosed by the record is necessary. The petitioner was one of several defendants, indicted, tried and convicted of unlawful possession of goods stolen from interstate commerce in violation of 18 United States Code § 659. The offenses charged centered around the hijacking of some men's suits, coats and wearing apparel of which approximately 1700 suits were brought to Bayonne, New Jersey, and placed in a garage located at 15 West 22nd Street. On January 11, 1962, the defendants, including petitioner, while at the above premises, were told they were under arrest by FBI agents and were taken into custody.[1]

The first ground for relief urged by the petitioner is that his statements to the FBI were inadmissible as having been obtained in violation of his right to counsel. The statement which the petitioner alleges was of an extremely prejudicial nature came into evidence at the 1963 federal trial through the testimony of Robert Straub, (Starub), FBI agent, as follows:

> "• • • Q. Mr. Straub, Friday afternoon when you were last testifying do you recall that you testified that you arrived back at the office with the defendant Konigsberg in a car I believe with Agent Roetzel, and I was asking you questions as to what transpired when you reached the F.B.I. office? Now I direct your attention to that time when you were in the F.B.I. office in the presence of the defendant and ask you what was said to you by the defendant Harold Konigsberg during the course of your conversation.

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[1] As to the remainder of the lengthy factual background and the surrounding circumstances involved herein, see *Konigsberg, supra*, at 845-847.

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> Mr. Brown: I object, if your Honor please, unless there are specific questions and answers and the time is set. Apparently this individual was there for some time.
>
> The Court: Objection overruled.
>
> A. Well, we sat down. We discussed the matter at hand, the arrest in Bayonne, and he stated, 'This is the first legitimate arrest the F.B.I. ever had me for.' We continued a discussion and he stated, 'That is one thing you guys have that I don't have, stool pigeons.'
>
> He was asked what he was doing in the garage and at first he stated, 'What garage?' and then later he stated he was trying to 'help a guy out.' * * *." [2]

If the legality of petitioner's detention has been decided adversely to him on direct appeal, in determining the right to § 2255 relief, the issue becomes whether adequate relief had been afforded at that time. During petitioner's 1963 federal trial, pursuant to the testimony of the FBI witnesses, as well as other evidence, the trial court found that while in custody he was fully and completely advised of his constitutional rights to the extent that he was notified of his right to counsel; he was warned before he made any statements that he was not required to make statements; and he was informed that anything he said could be used against him in a court of law. The Court of Appeals for the Third Circuit did not find any denial of a Sixth Amendment right to counsel and affirmed the trial court. In a petition for rehearing, petitioner argued that his statements to FBI Agents Straub and Robert Roetzel (Roetzel) were involuntary in light of *Escobedo* v. *Illinois*, 378 U.S. 478

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[2] Transcript in Crim. No. 31-62, pp. 907-908 (Vol. III).

(1964). The court concluded that "* * * [u]nder the evidence documented in our opinion, we found that the process in this case was investigatory, that it was uncontradicted that there had been no attempt to elicit a confession and that the facts of this matter differed radically from the Escobedo situation. We therefore supported the trial court's conclusion that Konigsberg's statements were voluntary and admissible into evidence." *Konigsberg, supra,* at 853.

The petitioner now argues that two factors having occurred between 1964 and 1968 cast his Sixth Amendment contention in a different light. The first contention is that "it became patently clear with *Miranda* v. *Arizona*, 384 U.S. 436 (1966) that the Court of Appeals in petitioner's case had misinterpreted the applicability of Escobedo." The second contention is that "petitioner was deprived of his freedom of action in a significant way at the time he made his incriminating statements and thus entitled to the Escobedo warnings.[3]

The petitioner was tried and convicted in 1963. The legality of his detention was raised and decided adversely to him on a direct appeal, *Konigsberg, supra,* and may not be relitigated. Petitioner's trial and conviction were completed prior to the effective date of both *Escobedo, supra,* and *Miranda, supra.* The rulings in each of these cases are not to be applied retroactively and are therefore inapplicable here. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). See also *Davis* v. *North Carolina,* 384 U.S. 737 (1966). However, petitioner asserts that their lack of retroactivity does not preclude him "from invoking the same safeguards as part of an involuntariness claim" although his trial has

[3] From petitioner's pro se brief, p. 9.

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already been completed. *Johnson, supra,* at 730. The Court of Appeals for the Third Circuit has already concluded that the petitioner had not been hindered or denied full and fair opportunity for consultation with his attorney and that his statements were voluntary and given with full knowledge of his right to counsel. In light of this background and in recognition that *Escobedo, supra,* and *Miranda, supra,* provide safeguards to protect the integrity of the truth determining process at trial, this court finds that this issue cannot serve as a basis for collateral relief.

The second ground for relief, urged for the first time by the petitioner in this matter, is that during the course of the original proceeding there was illegal suppression of evidence by the government which was favorable to the petitioner. Petitioner asserts that FBI Agents Straub and Roetzel changed or supplemented the testimony they had given at the 1963 federal trial, that in April 1967, during a New York Supreme Court hearing, these same FBI agents testified that petitioner was not permitted to speak to his lawyer until the incriminating statements were elicited from him; and it is further argued that this information was within the knowledge of the government during the 1963 federal trial. See *Brady* v. *Maryland,* 373 U.S. 83 (1963).

In *Lynott* v. *United States,* 360 F.2d 586, 588 (3d Cir. 1966), *cert. denied,* 386 U.S. 917 (1967), the court stated as a general rule that an allegation of fact in support of a § 2255 motion will ordinarily be accepted as true entitling the petitioner to an evidentiary hearing. *Hayman, supra; Marchibroda* v. *United States,* 368 U.S. 487, 489-96 (1962). If, however, the allegations of fact as raised by the petitioner are contradicted by the record made by the movant during the criminal proceeding, he is not entitled to relief and the § 2255 motion can be denied without a hearing.

It is clear that the government cannot knowingly use false evidence, including false testimony, to obtain a tainted conviction. Therefore, this court is duty bound to re-examine the evidentiary basis on which this allegation is founded to insure that there was not a deprivation of a constitutional right of the petitioner. A general allegation is made that FBI Agents Straub and Roetzel, who testified for the government, gave false testimony at the 1963 federal trial concerning whether petitioner had been permitted to consult with his attorney. In *United States* v. *Jenkins*, 281 F.2d 193, 194 (3d Cir. 1960), the court states that the alleged false testimony knowingly used by the government must be particularized and it must be asserted that the government was aware of the alleged perjury at the time of the trial. Thus, before a § 2255 motion may be granted on the ground of perjured testimony, the movant has the burden of so proving that allegation.

The petitioner points to the following testimony at the New York Supreme Court hearing:

> "Q. Did you let this defendant, when he at first asked and demanded to call his lawyer, at the time you gave him this warning, call his lawyer? A. If you are referring to in the automobile and you asked to make a phone call, we did not.
>
> Q. All right. Now when we got to the office, when you did let me call, it was three hours later, or two and a half hours later, from the time we entered the office; is that correct? A. I would say approximately that time, yes.
>
> Q. How many times would you say that you testified to that I requested—the words you used 'requested to call my lawyer,' prior to the time I called him? A. I'm sorry, you lost me there.
>
> Q. How many times did you testify to, at that trial, stating, when Mr. Brown asked you, 'How

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many times did he ask to call his lawyer?'—how many times did you say? A. I couldn't recall what I said.

Q. Well, how many times would you say I asked you? A. Well, as I say, you asked to use the phone.

Q. All right, Mr. Straub—— A. And I know you said, 'When can I call my attorney?' whether you asked——

Q. When I can call my attorney. Now I'm going to help you a little bit. This didn't come out in the record, and let me see how good your memory is Mr. Straub. You remember you and I sitting at the desk and Mr. Roetzel sitting on the side? A. Yes.

Q. Do you remember one time that I picked up the phone and Mr. Roetzel grabbed it, and you says to me, 'Aw Harold, that ain't necessary'—do you remember that? A. I think I do recall you grabbed a phone * * * ."[4]

"Q. Right. I was in the car with you. You made an arrest. I was under arrest. It was not investigatory, and I stated to you that I wanted to make a phone call several times; correct? A. Yes.

Q. So, therefore, you got this statement after I declared myself that I wanted to make calls. A. Yes.

Q. So your meaning, when you said that I had a right to an attorney and I wanted to call one, meant nothing * * *."[5]

"Q. Now, it was after the administration functions were finished that I made this call, correct? A. Yes.

Q. Was that the only reason I wasn't permitted to make the call, because you had administrative

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[4] Transcript of New York Supreme Court hearing, pp. 791-92.
[5] Transcript of New York Supreme Court hearing, pp. 789-99.

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functions? A. We had certain things that we had to get done.

Q. Like interrogating me? A. No.

Q. No. All right. Again was the phone right alongside of me? How much of an inconvenience would it have been to you if I used the phone? A. You used that phone.

Q. But when? When I asked, demanded or requested? A. At the time you picked it up.

Q. Did I use it at the time I picked it up? A. No.

Q. No. But you and Mr. Roetzel decided for me to use the phone, as you say, when you wanted it, not when I wanted to, because prior to that I tried to pick up the phone and make a call; is that correct? A. You tried to pick up the phone and make a call, yes.

Q. But I couldn't make the call at that time, could I? A. You didn't make the call * * *."[6]

This court is of the opinion after careful review that neither the transcripts of the 1963 federal trial nor the pertinent parts of the transcript of the 1967 New York Supreme Court hearing hereinabove quoted reveal any substantive discrepancies with regard to the factual allegations made by the petitioner concerning the "changed or supplemented" testimony of FBI Agents Straub and Roetzel even when the particularized evidence asserted here is considered most favorably to petitioner. To argue that the testimony of Straub and Roetzel was inconsistent does not indicate either perjury or suppression of favorable evidence by the government. A mere conclusionary statement of misconduct on the part of the government is not sufficient for relief.

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[6] Transcript of New York Supreme Court hearing, p. 807.

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The petitioner has not stated sufficient facts, which if they were true would entitle him to relief.

This is merely a collateral attempt by the petitioner to contradict the record made in the trial court in the 1963 federal trial. The record in this case completely contradicts petitioner's claim in this regard and compels the conclusion that in view of the allegations made and in view of the record and files, as well as the transcripts, this claim is without merit.

The third ground for relief urged by the petitioner is that he had standing to attack the search and seizure in the garage as being violative of the Fourth Amendment. This particular ground for relief, to wit: standing with regard to a claim of illegal search and seizure, was determined at petitioner's trial and was determined on the merits since it followed a motion to suppress. See *Townsend* v. *Sain*, 372 U.S. 293, 314 (1963). Further, the Court of Appeals for the Third Circuit affirmed the trial court on this point. The court took the position that *Jones* v. *United States*, 362 U.S. 257 (1960) was inapplicable in that narcotic cases are *sui generis*, recognizing the problems created by the possession of narcotics and decided that the *Jones* rule should not be extended to cases such as the present. The Court of Appeals reasoned that *Jones, supra*, was inapplicable because there "proof of possession was enough to convict" while in petitioner's case "possession is only one element of the crime charged." *Konigsberg, supra*, at 847.

Although there is some reason to believe that any constitutional claim is cognizable on collateral attack,[7] regard-

[7] See dissenting opinion in *Kuhl* v. *United States*, 370 F.2d 20, 30 (9th Cir. 1966); *United States* v. *Sutton*, 321 F.2d 221 (4th Cir. 1963); *Gaitan* v. *United States*, 317 F.2d 494 (10th Cir. 1963).

less of whether or not a similar claim was considered at the trial, it is settled in this circuit as in most other circuits[8] that a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence, but must be presented in the appeal from the conviction.[9] See *Jenkins, supra,* at 193.

In *Thornton, supra,* at 829, the court noted "* * * in any event, the recent decisions broadening collateral review as an assurance of the federal judicial process to state accused afford no comparable collateral machinery to federal prisoners who have already had access to the federal judicial process: access to a federal trial judge—indeed under § 2255 to the same federal judge if available; access to an array of effective federal remedies for rooting out the fruits of unreasonable searches; and access to the federal appellate system." This court does not find any exceptional circumstances present to warrant an exception to the general rule prohibiting collateral review. Neither has petitioner demonstrated that a redetermination of this issue would serve the ends of justice. Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief.

Having considered all the papers before me as well as the entire record of the prior proceedings by and against petitioner, I am of the opinion that under § 2255 there is

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[8] See *Thornton, supra,* at 824, Footnote 2; *DeWelles, supra.*

[9] It is unsettled, however, whether a claim of illegal search and seizure is forever foreclosed in a § 2255 proceeding, where, as here, a similar claim was considered at trial and upon a direct appeal.

no need for a hearing on any of the grounds raised by petitioner and that he is not entitled to the relief which he seeks.

It is on this 13th day of February, 1969, ORDERED that the motion of petitioner to vacate his sentence be and the same is hereby denied.

/s/ LAWRENCE A. WHIPPLE,
LAWRENCE A. WHIPPLE, U.S.D.J.

TO THE CLERK OF THE COURT:

Please mark as court exhibits in this case the following: (1) Petitioner's pro se Brief in Support of Motion to Vacate Sentence; (2) Transcript of 1967 New York Supreme Court hearing, pp. 338-385; (3) Transcript of 1967 New York Supreme Court hearing, pp. 760-816.

LAWRENCE A. WHIPPLE
United States District Judge

APPENDIX C

Notice of Appeal

(MOTION TO VACATE SENTENCE)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Docket #465-68

HAROLD KONIGSBERG,
Petitioner, Pro Se.,
Now! Appellant,

VS.

UNITED STATES OF AMERICA,
Respondent,
Now! Appellee.

Notice is hereby given that Harold Konigsberg the Petitioner Pro Se above named, hereby appeals to the United States Court of Appeals for the Third Circuit, * From the order of United States District Court Judge Lawrence A. Whipple, February 14, 1969 denying the Petitioner a Hearing on Title 28 Section 2255 United States Code. Motion to Vacate Sentence. *[Entered in the action on the 14th day of February, 1969].

HAROLD KONIGSBERG

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APPENDIX D

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17882

HAROLD KONIGSBERG,

Appellant,

v.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 10, 1969

Before McLAUGHLIN, FORMAN, and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 28, 1969)

PER CURIAM.

Harold Konigsberg appeals from a denial by the United States District Court for the District of New Jersey of his motion pursuant to 28 U.S.C. § 2255 to vacate a sentence of ten years imposed upon him in that court on July 16, 1963. He was convicted on an indictment charging him with possession of property stolen from interstate commerce in violation of 18 U.S.C. § 659. The conviction was affirmed in an opinion by this court [1] where the facts and arguments of the case were so fully explored as to make

[1] *United States* v. *Konigsberg*, 336 F.2d 844, *rehearing denied*, 336 F.2d 853 (3d Cir. 1964), *cert. denied*, 379 U.S. 933 (1964).

references to them here unnecessary unless they bear directly upon the issues of the instant appeal.

Appellant is principally aggrieved by the failure of the District Court to view favorably two grounds for his § 2255 motion which he urges originated after the affirmance of his conviction by this court in 1964. The first is his contention that testimony taken at a 1967 Supreme Court hearing [2] showed that during his 1963 trial there was illegal suppression by the Government of evidence which was favorable to him. Specifically, he argued that the thrust of this testimony demonstrated that the arresting Federal Bureau of Investigation agents refused to allow the appellant the use of a telephone to call his lawyer for several hours after his arrest.[3] Appellant urges that had this court

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[2] A New York State post-conviction hearing was held in the New York County Supreme Court to determine whether the appellant was a multiple felony offender.

[3] The District Court cited the following portions of the examination of Agent Straub by the appellant:

> "Q. Did you let this defendant, when he at first asked and demanded to call his lawyer, at the time you gave him this warning, call his lawyer? A. If you are referring to in the automobile and you asked to make a phone call, we did not.
>
> Q. All right. Now when we got to the office, when did you let me call, it was three hours later, or two and a half hours later, from the time we entered the office; is that correct? A. I would say approximately that time, yes.
>
> Q. How many times would you say that you testified to that I requested—the words you used 'requested to call my lawyer,' prior to the time I called him? A. I'm sorry, you lost me there.
>
> Q. How many times did you testify to, at that trial, stating, when Mr. Brown asked you, 'How many times did he ask to call his lawyer?'—how many times did you say? A. I couldn't recall what I said.
>
> Q. Well, how many times would you say I asked you? A. Well, as I say, you asked to use the phone.

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Q. All right, Mr. Straub—— A. And I know you said, 'When can I call my attorney?' whether you asked——

Q. When can I call my attorney. Now, I'm going to help you a little bit. This didn't come out in the record, and let me see how good your memory is Mr. Straub. You remember you and I sitting at the desk and Mr. Roetzel sitting on the side? A. Yes.

Q. Do you remember one time that I picked up the phone and Mr. Roetzel grabbed it, and you says to me, 'Aw Harold, that ain't necessary'—do you remember that? A. I think I do recall you grabbed a phone * * *." (Transcript of New York Supreme Court hearing, pp. 791-92).

"Q. Right. I was in the car with you. You made an arrest. I was under arrest. It was not investigatory, and I stated to you that I wanted to make a phone call several times; correct? A. Yes.

Q. So, therefore, you got this statement after I declared myself that I wanted to make calls. A. Yes.

Q. So your meaning, when you said that I had a right to an attorney and I wanted to call one, meant nothing * * *." (Transcript of New York Supreme Court hearing, pp. 798-99).

"Q. Now, it was after the administration functions were finished that I made this call, correct? A. Yes.

Q. Was that the only reason I wasn't permitted to make the call, because you had administrative functions? A. We had certain things that we had to get done.

Q. Like interrogating me? A. No.

Q. No. All right. Again was the phone right alongside of me? How much of an inconvenience would it have been to you if I used that phone? A. You used that phone.

Q. But when? When I asked, demanded or requested? A. At the time you picked it up.

Q. Did I use it at the time I picked it up? A. No.

Q. No. But you and Mr. Roetzel decided for me to use the phone, as you say, when you wanted it, not when I wanted to, because prior to that I tried to pick up the phone and make a call; is that correct? A. You tried to pick up the phone and make a call, yes.

Q. But I couldn't make the call at that time, could I? A. You didn't make the call * * *." (Transcript of New York Supreme Court hearing, p. 807).

Konigsberg v. *United States*, No. 465-68, pp. 8-10 (D.C.N.J. February 13, 1969).

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been informed of these facts at the time of its affirmance of the 1963 conviction, it would have been compelled by *Escobedo* v. *Illinois*[4] to exclude the incriminating statements.[5]

This argument, however, ignores the fact that the testimony given at the New York hearing did not reveal any substantive discrepancies from the testimony of the agents at the 1963 trial. There, one of the agents in question testified that the incriminating statements were freely offered by the appellant.[6] Moreover, both the trial court and this court on appeal found no evidence suggesting that there was a denial of counsel. In denying a petition for rehearing, it was concluded that:

> "Under the evidence documented in our opinion, we found that the process in this case was investigatory, that it was uncontradicted that there had been no attempt to elicit a confession and that the facts of this matter differed radically from the Escobedo situation. We therefore supported the trial court's conclusion that Konigsberg's statements were voluntary and admissible into evidence."[7]

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[4] 378 U.S. 478 (1964).

[5] Appellant adds that the subsequent Supreme Court decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), also makes it clear that this court erred in its decision that the incriminating statements did not fall within the purview of the *Escobedo* decision. However, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) holds that *Miranda* is not to be applied retroactively under circumstances similar to the instant case.

[6] Agent Straub testified that his talk with Konigsberg ". . . was more like a conversation than an interview." *Konigsberg* v. *United States*, 336 F.2d at 852.

[7] *Id.* at 853.

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The new testimony offered by appellant in no way contradicts the court's previous determination that at the time the incriminating statements were made the process of the case was investigatory and not accusatory. Due consideration of this testimony leaves us convinced that, contrary to the appellant's contentions, had the court been aware of it at the time of the appellant's direct appeal it would have had no effect on its ruling.

Appellant's second contention is that the District Court erred in not considering the question of his standing to contest the legality of a search and seizure which occurred during his arrest.[8] He argues that under the recent Supreme Court decision in *Kaufman* v. *United States*[9] the District Court was obligated to consider this question. Once having considered it, he contends that the decision in *Simmons* v. *United States*[10] would have required the District Court to grant the § 2255 motion since the *Simmons* decision, he argues, makes it clear that he had standing to challenge the legality of the search and seizure.

Kaufman, however, did not establish a mandatory rule controlling in all cases. The Court there held that questions concerning search and seizure were entitled to the same consideration in a § 2255 motion as other constitutional claims. But the Court also stated that

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[8] On the authority of the decisions in *Thornton* v. *United States*, 368 F.2d 822 (D.C. Cir. 1968) and *United States* v. *Jenkins*, 281 F.2d 193 (3d Cir. 1960), the District Court held in part that

> "a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence, but must be presented in the appeal from the conviction."

Konigsberg v. *United States*, No. 465-68 (D.N.J., February 13, 1969).

[9] 394 U.S. 217 (1969).

[10] 390 U.S. 377 (1968).

> "when a request for relief under §2255 asserts a claim of unconstitutional search and seizure which *was tested by a motion to suppress at or before trial under Fed. Rule Crim. Proc. 41(e), the § 2255 court need not stop to review the adequacy of the procedure established by that rule. . .*" [11] (Emphasis supplied.)

Thus, where a federal court had an opportunity to consider the merits of the contention it is within the discretion of the § 2255 court whether or not to relitigate the issue. Since in this case there had been a motion to suppress at trial and a full consideration of the merits on appeal, we find that the District Court acted well within the bounds of proper discretion in refusing to consider the appellant's contention that he had standing to contest the search and seizure. Furthermore, assuming that the appellant had standing, it is noteworthy that both the trial court [12] and this court [13] found with ample ground that probable cause for arrest existed at the time of the search and seizure.

Appellant's additional argument on this appeal that because the jury was present during a portion of the hearing on the voluntariness of his incriminating statements he was denied a *Jackson* v. *Denno* [14] hearing is also without merit. Again, appellant is attempting to collaterally attack an issue raised on direct appeal and decided adversely to him. The conclusion already determined by this court is still apt:

> "Since Escobedo is inapplicable to the situation before us, the argument that Konigsberg's statement

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[11] 394 U.S. at 277.

[12] *United States* v. *Konigsberg*, No. 31-62 (D.C.N.J., July 10, 1963).

[13] *Konigsberg* v. *United States*, 336 F.2d at 848.

[14] 378 U.S. 368 (1964).

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was involuntary and therefore he was deprived of due process of law under Jackson v. Denno must fall." [15] (Citations omitted.)

The appellant's charge that the District Court erred in refusing to grant an evidentiary hearing on his petition is stripped of any substance by the failure of the file and the entire record to disclose a valid justification therefor. They were painstakingly reviewed by the District Judge under the standards enunciated in *Sanders* v. *United States.*[16]

The other arguments raised on this appeal are not worthy of discussion.

The order of the United States District Court for the District of New Jersey of February 13, 1969 denying appellant's motion to vacate his sentence will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[15] *Konigsberg* v. *United States*, 336 F.2d at 853. It is also noted that the *Jackson* decision did not hold that voluntariness hearings must be conducted outside the presence of the jury. See *Pinto* v. *Pierce*, 389 U.S. 31 (1967).

[16] 373 U.S. 1 (1963).

APPENDIX E

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,882

HAROLD KONIGSBERG,

Appellant,

vs.

UNITED STATES OF AMERICA.

(D. C. Civil Action No. 465-68)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present: MCLAUGHLIN, FORMAN and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 13, 1969, be, and the same is hereby affirmed. Costs taxed in favor of appellee.

Attest:

THOMAS F. QUINN,
Clerk.

November 28, 1969

APPENDIX F

Constitutional Provisions Involved

FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT:

"nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."